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COMPENSATION FOR THE TAKING OF PROPERTY AND THE POLICE POWER. — The constitutional guaranty against the taking of private property without compensation was recently invoked without success before the Supreme Court of the United States. A city connected two lakes in a park system by a canal with sidewalks on each side, causing a railroad whose track ran across the line of the canal to build a bridge. Compensation was allowed for the land taken, but not for building and maintaining the bridge. *Chicago, M. & St. P. Ry. Co.* v. *City of Minneapolis*, 34 Sup. Ct. 400.

An implied reservation by the state, in incorporating or granting eminent domain to a railroad, of a right to acquire easements over its right of way, would of course relieve the public of making any compensation at all, even for the land;[1] but, when the power of eminent domain is relied on, it is at first difficult to see why the public should not pay for the consequential damages as well as for the land.[2] The theory underlying the court's decision is that, when an easement is acquired by eminent domain, obedience to the police power imposes on the railroad the duty of provid-

[1] That there is such an implied reservation is somewhat vaguely suggested in some cases, but never applied logically. Apparently all that is meant is that the state does not bargain away its police power when it incorporates a railroad and gives it the right of eminent domain. See Cincinnati, I. & W. Ry. Co. *v.* Connersville, 218 U. S. 336, 343, 344.

[2] See LEWIS, EMINENT DOMAIN, 3 ed., § 686, for a long list of cases supporting the proposition that when a part is taken just compensation must be made for the consequential damages to the remainder.

ing for the public safety, which may in some cases require the building of a bridge.[3] That a railroad must guard against injuring the public, although the conditions involving danger are forced upon it, seems well settled; for, in the case of a subsequently opened highway, it must maintain gates, flagmen, cattle guards, bridges at dangerous grade crossings and the like, without compensation.[4]

As far as these readjustments are for the purpose of protecting the public from danger, the expense may rightfully be imposed on the railroad. That compensation is not required whenever the deprivation is justified under the police power is the commonly accepted statement of the rule. But some modern definitions of the police power may lead to confusion, since they are broad enough to include the taking of property for almost any purpose beneficial to the public as a whole.[5] If the police power is "but another name for the power of government," [6] and "extends to all great public needs," [7] and if compensation be denied whenever it is exercised, it is obvious that there is nothing left of the constitutional guaranty. But if it is borne in mind that these broad definitions refer to the interests of society, which it is the purpose of the police power to protect, and that it is only deprivation of property in the exercise of protective power which requires no compensation, then the confusion caused by the broad definitions is avoided.[8] Whenever the right to compensation for property and incidental expense is invoked, the emphasis should be placed on the purpose of the taking. The test is whether property is condemned to promote an affirmative public undertaking, or, in other words, to confer an added benefit to the public; or whether, to prevent harm to an established public interest, a deprivation of property is necessary, either in the form of an imposition of expense, or of the actual taking or destruction of property which participates in causing a public detriment.[9]

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[3] See same case in the Supreme Court of Minnesota, 115 Minn. 460, 465, 133 N. W. 169, 171.

[4] New York & N. E. R. R. Co. *v.* Bristol, 151 U. S. 556; Chicago, B. & Q. R. R. Co. *v.* Chicago, 166 U. S. 226; Chicago, B. & Q. R. R. Co. *v.* Nebraska, 170 U. S. 57; No. Pac. Ry. Co. *v.* Duluth, 208 U. S. 583; Cincinnati, I. & W. Ry. Co. *v.* Connersville, 218 U. S. 336; State *ex rel.* Minneapolis *v.* St. P., Minn. & Man. Ry. Co., 98 Minn. 380, 108 N. W. 261; LEWIS, EMINENT DOMAIN, 3 ed., § 244.

[5] "We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety." Chicago, B. & Q. Ry. Co. *v.* Drainage Commissioners, 200 U. S. 561, 592, 26 Sup. Ct. 341, 349. See also Bacon *v.* Walker, 204 U. S. 311, 317, 27 Sup. Ct. 289, 291; Noble State Bank *v.* Haskell, 219 U. S. 104, 111, 31 Sup. Ct. 186, 188; Mutual Loan Co. *v.* Martell, 222 U. S. 225, 233, 32 Sup. Ct. 74, 75.

[6] See Mutual Loan Co. *v.* Martell, 222 U. S. 225, 233, 32 Sup. Ct. 74, 75.

[7] See Noble State Bank *v.* Haskell, 219 U. S. 104, 111, 31 Sup. Ct. 186, 188.

[8] See Chicago, B. & Q. Ry. Co. *v.* Drainage Commissioners, 200 U. S. 561, 592, 26 Sup. Ct. 341, 349.

[9] See Philadelphia *v.* Scott, 81 Pa. St. 80, 85; FREUND, POLICE POWER, § 511; RANDOLPH, EMINENT DOMAIN, § 23.

The familiar governmental power of regulating public-service companies is to be distinguished from either the police power or eminent domain. It is an inherent power of government similar to, but not the same as, the protective police power, because it does more than protect. On the other hand, it is distinguished from the power of eminent domain in that it is to be exercised only to further the purposes of the public service involved. It is like eminent domain, however, in that a reasonable compen-

The principal case presents a difficult question in the application of this test. On the one hand, there is the element of protection of the public in the use of its easement, in that the travel on the sidewalks and canal is made safer. On the other hand, the very nature of a canal necessitates the building of a bridge aside from reasons of public safety.[10] The expense of an ordinary bridge should be chargeable to the creation of this new public right. The railroad theoretically should bear only the added expense necessary in making the bridge of such form as will insure against danger to the public passing underneath. Because of the difficulty in differentiating the two elements involved, the result of the principal case may perhaps afford rough justice, but it is submitted a more just and scientific result could have been reached by some attempt at differentiation by expert estimate. In so doing, what seems an inroad on the constitutional guaranty against the taking of private property without compensation could have been avoided.

RIGHT OF RECOVERY FOR TESTAMENTARY LIBEL. — A testator, leaving a small bequest to his niece, described her in the will as the illegitimate child of his brother. A recovery was allowed against the estate of the deceased in an action of libel. *Harris* v. *Nashville Trust Co.*, 162 S. E. 584 (Tenn.). The court argues that, although the principle *actio personalis moritur cum persona* causes a tort action accruing during the life of the wrongdoer to abate, the peculiar fact in the principal case that the wrong resulting from the tortious act occurred only after the death of the tortfeasor renders the maxim inapplicable.[1] The question of the survival or creation of rights after death, as a result of obligations incurred or acts done during the life of the deceased, is rendered difficult by its historical development.

Historically the earliest common law seems to have considered that death terminated all rights and obligations. Since personal rights and their correlative duties could only exist *inter partes*, after death this double relation was impossible; and substitution, as well as assignment *inter vivos*, was thought inconsistent with the personal nature of the obligations.[2] The non-transferability of choses in action to-day is traceable to the same idea.[3] With the establishment of a right to inherit or to acquire property by testamentary disposition, the notion developed that an obligee might have rights, arising at death, in the prop-

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sation is always ultimately contemplated, regulation amounting to confiscation being unconstitutional.

[10] See dissenting opinion in principal case when in Minnesota Supreme Court. Chicago, M. & St. P. Ry. Co. *v.* City of Minneapolis, 115 Minn. 460, 473, 133 N. W. 169, 174.

[1] Although the possibility of a tort being committed in the publication to the attesting witnesses during the testator's life is conceded by the court, the discussion is confined to the re-publication in the probate of the will.

[2] See 3 STREET, FOUNDATION OF LEGAL LIABILITY, ch. vi; 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 258. For discussion of the early idea that all property interest ceased at death, see BIGELOW, THEORY OF POST-MORTEM DISPOSITION, 11 HARV. L. REV. 69; GROSS, MEDIEVAL LAW OF INTESTACY, 18 HARV. L. REV. 120.

[3] See 3 STREET, FOUNDATION OF LEGAL LIABILITY, 62.